

1 KEKER & VAN NEST LLP  
ROBERT A. VAN NEST - # 84065  
2 rvannest@kvn.com  
BRIAN L. FERRALL - # 160847  
3 bferrall@kvn.com  
DAVID SILBERT - # 173128  
4 dsilbert@kvn.com  
MICHAEL S. KWUN - # 198945  
5 mkwun@kvn.com  
6 633 Battery Street  
San Francisco, CA 94111-1809  
Telephone: 415 391 5400  
7 Facsimile: 415 397 7188

8 Attorneys for Defendant ARISTA NETWORKS, INC.

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

12 CISCO SYSTEMS, INC.,

13 Plaintiff,

14 v.

15 ARISTA NETWORKS, INC.,

16 Defendant.

Case No. 5:14-cv-05344-BLF (PSG)

**DEFENDANT ARISTA NETWORKS,  
INC.'S MOTION TO STRIKE  
DECLARATION OF KEVIN ALMEROTH  
(DKT. NO. 91-1) SUBMITTED IN  
SUPPORT OF PLAINTIFF CISCO  
SYSTEMS, INC.'S OPENING CLAIM  
CONSTRUCTION BRIEF**

Claim Construction Hearing: Mar. 18, 2016

**NOTICE OF MOTION AND MOTION**

Notice is hereby given to Plaintiff Cisco Systems, Inc. that Defendant Arista Networks, Inc. hereby moves to strike the Declaration of Dr. Kevin Almeroth (Dkt. No. 91-1), which Plaintiff submitted in support of its Opening Claim Construction brief (Dkt. No. 91). This motion is noticed for March 18, 2016, the date of the Court's Claim Construction Hearing in Courtroom 3, 5th Floor, 280 South 1st Street, San Jose, California.

**I. INTRODUCTION**

Defendant Arista Networks, Inc. ("Arista") moves to strike the Declaration of Dr. Kevin Almeroth (Dkt. No. 91-1), which Plaintiff Cisco Systems, Inc. ("Cisco") submitted in support of its Opening Claim Construction brief (Dkt. No. 91). Cisco failed to disclose Dr. Almeroth's opinions by the deadline imposed by this Court's Scheduling Order (Dkt. No. 51) and Patent Local Rule 4-2(b) (requiring disclosure of all extrinsic evidence, including expert opinions, at the time proposed constructions are exchanged).

Cisco failed to identify *any* extrinsic evidence from Dr. Almeroth by the deadline established by the Court and the Local Rules. After that deadline, Cisco identified three topics on which Dr. Almeroth would opine, but still failed to provide adequate disclosure of his opinions. And when Cisco finally submitted its Opening Claim Construction Brief, it relied on Dr. Almeroth's opinions on two claim terms that Cisco had never previously identified (*i.e.*, beyond the three already belatedly identified terms), and cited to extrinsic evidence that Cisco never previously identified or produced. Cisco's late disclosures warrant exclusion of the Almeroth Declaration (Dkt. No. 91-1) ("Almeroth Decl.").

**II. FACTS**

The Scheduling Order set a deadline of August 24, 2015 for the parties to exchange their preliminary claim constructions and extrinsic evidence pursuant to Patent Local Rule 4-2. (Dkt. No. 51) at 1. On that day, Cisco identified no opinions by Dr. Almeroth on which it would rely. Instead, its entire disclosure regarding Dr. Almeroth, read:

Cisco may provide testimony from [Almeroth] to provide tutorial background regarding the technology at issue, to address the meaning and subject matter of the asserted patent claims as they would be understood by those of ordinary skill in the

1 art at the time any patents were filed, to address the proper construction of various  
 2 claim terms in light of the intrinsic and extrinsic evidence and/or the meaning of  
 3 the term to one of ordinary skill in the art, to rebut claim construction positions  
 taken by Arista and/or any of its experts, and to otherwise assist the Court in  
 construing the asserted patents.

4 *See* (Dkt. No. 95-1 (Cisco Rule 4-2(b) Disclosure) at 1–2).

5 On September 18, 2015, after Arista notified Cisco that it had failed to timely disclose any  
 6 opinions from Dr. Almeroth as required by the Local Rules and the Court’s Scheduling Order,  
 7 Cisco disclosed for the first time in the Joint Claim Construction Statement the claim terms about  
 8 which Almeroth “may” testify, but still withheld any description of the substance of the opinions.  
 9 (Dkt. No. 70 at 3). For instance, Cisco stated that “Almeroth’s testimony may include opinions  
 10 on the level of ordinary skill in the art,” without identifying what level of skill Dr. Almeroth  
 11 intended to endorse. (*Id.*) With regard to the ’526 patent, Cisco stated that Dr. Almeroth “may  
 12 also rebut Arista’s anticipated arguments that ‘generic command’...[is] indefinite,” without  
 13 disclosing what Dr. Almeroth’s opinion would be. (*Id.*) Similarly, with regard to the ’886 patent,  
 14 Cisco stated that Dr. Almeroth “may opine” in favor of Cisco’s constructions for the terms  
 15 “XML” and “parsing the output message to identify at least one CLI token,” without identifying  
 16 Dr. Almeroth’s specific opinions. (*Id.*) Arista again objected to this partial disclosure as late and  
 17 inadequate. (*Id.* at 3-4).

18 On November 2, 2015 when Cisco filed its Opening Claim Construction Brief, Cisco  
 19 submitted an accompanying declaration from Dr. Almeroth that went beyond even the broadest  
 20 reading of Cisco’s belated and inadequate disclosure in two key respects. *First*, Dr. Almeroth  
 21 opined on two terms relating to the ’526 patent that Cisco had never previously identified:  
 22 “management programs” and “recursively traversing the command parse tree based on an order of  
 23 the input command words.” Almeroth Decl. at 18-19 & 22-24. *Second*, Dr. Almeroth’s  
 24 declaration relied on numerous sources of extrinsic evidence that Cisco never previously  
 25 identified or produced. *Id.* at ¶ 41 (quoting Kenneth B. Sall, *XML Family of Specifications: A*  
 26 *Practical Guide* (2002), which was never produced); ¶¶ 42 & 43 (citing to pages from the W3C  
 27 website, and attaching those same pages at Appendix C); ¶ 80 (quoting from Rubio-Sanchez *et*  
 28 *al.*, *A Gentle Introduction to Mutual Recursion* (2008), and attaching the article at Appendix D).

1 In the parties' case management statement filed on November 4, 2015, Arista once again  
 2 raised the issue of Cisco's inadequate disclosure regarding Dr. Almeroth's opinions and sought to  
 3 strike the Almeroth Declaration. (Dkt. No. 95 at 12). At the CMC, the Court advised Arista to  
 4 address the issue in the context of briefing claim construction, and that the parties would have to  
 5 "take their chances on whether it's in or out." (Dkt. No. 106 at 34:21-22). Accordingly, on  
 6 November 23, 2015, Arista deposed Dr. Almeroth while reserving its rights to strike the Almeroth  
 7 Declaration.

### 8 **III. ARGUMENT**

9 The entirety of the Almeroth Declaration (Dkt. No. 91-1) should be stricken due to  
 10 Cisco's violation of this Court's Scheduling Order and Patent Local Rule 4-2. Rule 4-2(b)  
 11 provides that, along with preliminary claim constructions, a party must:

12 [D]esignate any supporting extrinsic evidence including, without limitations,  
 13 dictionary definitions, citations to learned treatises and prior art, and testimony of  
 14 percipient and expert witnesses. **Extrinsic evidence shall be identified by**  
 15 **production number or by producing a copy if not previously produced. With**  
 16 **respect to any supporting witnesses, percipient or expert, the identifying**  
 17 **party shall also provide a description of the substance of that witness'**  
 18 **proposed testimony that includes a listing of any opinions to be rendered in**  
 19 **connection with claim construction.**

20 Patent L.R. 4-2(b) (emphasis added). This rule ensures that a party has sufficient disclosure of  
 21 the relevant evidence regarding claim construction *before* it commits to binding claim  
 22 construction positions. There is no question that Cisco's August 24, 2015 disclosure pursuant to  
 23 Rule 4-2(b) violated this rule because it did not include "a description of the substance of  
 24 [Almeroth's] proposed testimony," or a "listing of any opinions to be rendered." *Id.*  
 25 Additionally, Arista did not have any fair disclosure of the substance of Dr. Almeroth's testimony  
 26 by its deadline for submitting proposed constructions, and was therefore prejudiced.  
 27 Accordingly, the Almeroth declaration should be stricken in its entirety.

28 Importantly, Cisco's belated disclosure on September 18, 2015 did nothing to cure Cisco's  
 rule violation or reduce the prejudice to Arista. *First*, Cisco's September 18, 2015 disclosure  
 came on the same day that Arista was expected to commit to binding claim construction  
 positions. Relatedly, Arista was not at liberty to just ignore the case deadlines and add new  
 rebuttal extrinsic evidence or expert testimony, as Cisco apparently feels entitled to do.

1 Accordingly, Cisco's late disclosure did not reduce any prejudice to Arista.

2       *Second*, even Cisco's belated September 18 disclosure failed to comply with Rule 4-2(b).  
 3 For some topics Cisco identified in that disclosure, Cisco did not provide *any* disclosure of what  
 4 Dr. Almeroth's opinions would be. *See* (Dkt. No. 70-0 at 3) (stating that Dr. Almeroth "may also  
 5 rebut Arista's anticipated arguments that 'generic command' ...[is] indefinite"). But even for  
 6 those two claim terms where Cisco disclosed that Dr. Almeorth "may" support Cisco's proposed  
 7 constructions, Cisco's disclosures do not constitute a "description of the substance" of Almeroth's  
 8 opinions, as Rule 4-2(b) requires. At most, Cisco supplied a "listing of . . . opinions," which  
 9 certainly must be "included" in the "description of the substance of that witness' proposed  
 10 testimony," but which does not constitute a complete description. Patent L.R. 4-2(b). To serve  
 11 its intended purpose, Rule 4-2(b) requires a description that is at least sufficiently specific to  
 12 inform the opposing side whether it needs to alter its proposed construction or to submit  
 13 additional extrinsic evidence or expert testimony. By contrast, Cisco's September 18 disclosure  
 14 provided no information at all.

15       Cisco has also sought to rely on *Reflex Packaging v. Lenovo* to justify its conduct, but that  
 16 case should not apply here. No. C 10-01002 JW, 2011 WL 7295479, at \*2 (N.D. Cal. Apr. 7,  
 17 2011). In *Reflex Packaging*, the court excused a late and abbreviated disclosure of an expert's  
 18 anticipated opinions—but did so in a situation where the party moving to strike the expert's  
 19 opinions supplied a similarly abbreviated disclosure for its own expert. *Id.* (noting that, among  
 20 other things, the "similarity between Defendant's disclosure and the disclosure which Defendant  
 21 contents was insufficient, support[s] a finding that Plaintiff adequately disclosed the expert  
 22 testimony it intended to use"). What was good for the goose may have been good for the gander  
 23 in *Reflex Packaging*, but the circumstances here are different. Only Cisco has ignored the Local  
 24 Rules and the Court's Scheduling Order. Moreover, it has not attempted to show—and  
 25 presumably could not show—that it was incapable of properly disclosing Dr. Almeroth's opinions  
 26 in the exercise of ordinary diligence, and its delay has prejudiced Arista.

27       Moreover, while Cisco improperly failed to disclose any of Dr. Almeroth's opinions, it  
 28 has absolutely no justification for submitting with Dr. Almeroth's declaration: (1) opinions that

1 go beyond the scope of Cisco's September 18 disclosure (Almeroth Decl., ¶¶ 59-62 & 71-80); or  
2 (2) previously undisclosed extrinsic evidence (*id.*, ¶¶ 41-43 & 80). Accordingly, in all events, the  
3 Court should strike at least these portions of Dr. Almeroth's opinions.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court should strike the Almeroth Declaration in its entirety,  
6 or, barring that, at least as to ¶¶ 41-43, 59-62, and 71-80.

7 Dated: December 7, 2015

KEKER & VAN NEST LLP

9 By: /s/ Robert A. Van Nest  
10 ROBERT A. VAN NEST

11 Attorneys for Defendant ARISTA  
12 NETWORKS, INC.  
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